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7 UNITED STATES DISTRICT COURT
8 NORTHERN DISTRICT OF CALIFORNIA
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10 JOANNE P. FRAZIER ,

No. C 05-2355 WDB

11 Plaintiff,

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT,
DENYING PLAINTIFF'S CROSS-
MOTION FOR SUMMARY
JUDGMENT AND DENYING
PLAINTIFF'S MOTION TO
REMAND

12 v.

13 THE COMMISSIONER OF THE
14 SOCIAL SECURITY
ADMINISTRATION,

15 Defendant.
16 _____/

17 **I. Introduction**

18 Plaintiff Joanne Frazier seeks judicial review of a final decision by the
19 Commissioner of Social Security denying her Disability Insurance Benefits under
20 Title II of the Social Security Act. On November 21, 2005, plaintiff moved for
21 summary judgment. Defendant JoAnne B. Barnhart, in her capacity as Commissioner
22 of Social Security, opposed plaintiff's motion and filed a cross-motion for summary
23 judgment on December 22, 2005. Plaintiff replied on January 19, 2006. The matter
24 was then deemed submitted for decision by this court without oral argument, pursuant
25 to Civil Local Rule 16-5. After careful review and consideration of the record and
26 the papers submitted, the Court hereby grants defendant's motion for summary
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1 judgment, denies plaintiff's motion for summary judgment, and denies plaintiff's
2 motion for remand.

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4 **II. Procedural Background**

5 Plaintiff applied for disability insurance benefits on November 4, 2002,
6 alleging that back pain had rendered her disabled since December 11, 2001. Her
7 request was denied initially and on reconsideration. Plaintiff then requested and
8 received a hearing before an Administrative Law Judge ("ALJ"). On February 11,
9 2004, that hearing was held before the Honorable Richard P. Laverdure. Ms. Frazier
10 testified at the hearing and was accompanied by her legal counsel, Mr. William
11 Galvin. Robert Raschke, M.S., a vocational expert, also appeared and testified at the
12 hearing. On March 16, 2004, Judge Laverdure issued his written decision. Judge
13 Laverdure found that, although plaintiff was unable to perform her past relevant
14 work, she was not disabled within the meaning of the Social Security Act. He
15 therefore denied her request for disability benefits.

16 Plaintiff then appealed to the Social Security Administration's Appeals
17 Council, which determined that there was no basis for review. On October 15, 2004,
18 Judge Laverdure's decision became the final decision of the Commissioner of Social
19 Security in plaintiff's case.¹ On June 9, 2005, plaintiff filed a complaint in federal
20 court seeking review of Judge Laverdure's decision. Both parties have consented in
21 writing to proceed before the undersigned United States Magistrate Judge.

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27 Between October 15, 2004, and June 9, 2005, plaintiff applied for, and received,
28 numerous extensions of time in which to file her federal Complaint.

1 III. Standard of Review

2 The district court may set aside the Commissioner's denial of disability
 3 insurance benefits only when the ALJ's findings are based on legal error or are not
 4 supported by substantial evidence in the record as a whole. 42 U.S.C. § 405(g);
 5 Tackett v. Apfel, 180 F.3d 1094, 1097-98 (9th Cir. 1999) (citations omitted).
 6 "Substantial evidence" means more than a scintilla but less than a preponderance; it
 7 is such evidence that a reasonable mind might accept as adequate to support a
 8 conclusion. Richardson v. Perales, 402 U.S. 389 (1971); Meanel v. Apfel, 172 F.3d
 9 1111, 1113 (9th Cir. 1999). "If the evidence can support either outcome, the court
 10 may not substitute its judgment for that of the ALJ." Tackett, 180 F.3d at 1098,
 11 quoting Matney v. Sullivan, 981 F.2d 1016, 1018 (9th Cir. 1992). "But the
 12 Commissioner's decision 'cannot be affirmed simply by isolating a specific quantum
 13 of supporting evidence.'" Id., quoting Sousa v. Callahan, 143 F.3d 1240, 1243 (9th
 14 Cir. 1998). "Rather, a court must 'consider the record as a whole, weighing both
 15 evidence that supports and evidence that detracts from the Secretary's conclusion.'"
 16 Id., quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993).

17 18 IV. Discussion

19 A. Applicable Law -- Steps To Determining Disability

20 _____A Social Security claimant is considered disabled if (1) she suffers from a
 21 "medically determinable physical or mental impairment which can be expected to
 22 result in death or which has lasted or can be expected to last for a continuous period
 23 of not less than twelve months," and (2) the "impairment or impairments are of such
 24 severity that [s]he is not only unable to do [her] previous work but cannot,
 25 considering [her] age, education, and work experience, engage in any other kind of
 26 substantial gainful work which exists in the national economy." 42 U.S.C. §
 27 423(d)(1)(A), (2)(A).

1 The Social Security Regulations set out a five-step sequential process for
2 determining whether a claimant is disabled within the meaning of the Social Security
3 Act. 20 C.F.R. § 404.1520. First, the claimant must not be presently engaged in
4 substantial gainful employment. 20 C.F.R. § 404.1520(a)(4)(i). Second, the
5 claimant's impairment must be "severe." 20 C.F.R. § 404.1520(a)(4)(ii). Third,
6 when the claimant has an impairment that both (1) meets the duration requirement
7 and (2) is listed in Appendix 1 (impairments listed in subpart P of part 404 of 20
8 C.F.R., which are presumed severe enough to preclude work), or is equal to a listed
9 impairment, benefits are awarded without considering the claimant's age, education,
10 and work experience. 20 C.F.R. § 404.1520(a)(4)(iii). Fourth, if the claimant's
11 impairments do not meet or equal a listed impairment, all relevant medical and other
12 evidence in the claimant's case record is assessed and findings are made to determine
13 the residual functional capacity² of the claimant in order to evaluate whether the
14 claimant can do his or her past work. 20 C.F.R. § 404.1560(a)(4)(iv). Fifth, if the
15 claimant cannot continue with her past work, the ALJ must determine whether the
16 claimant is able to do any other type of work. 20 C.F.R. § 404.1560(a)(4)(v). If the
17 ALJ finds against the claimant at any step along the way, the claimant is not
18 "disabled" and there is no need to continue subsequent steps of the analysis.

19 To establish a disability claim, the claimant bears the initial burden of proof to
20 show that he or she is unable to perform his or her past relevant work. If met, the
21 burden of proof then shifts to the Commissioner to demonstrate that the claimant
22 retains residual functional capacity to perform a significant number of other jobs in
23 the national economy that are consistent with the claimant's impairments and
24 vocational factors such as age, education and work experience. Howard v. Heckler,

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28 Residual functional capacity is the most an individual can do in a work setting despite
his or her limitations. 20 C.F.R. § 404.1545(a)(1).

1 782 F.2d 1484, 1486 (9th Cir. 1986); Pinto v. Massanari, 249 F.3d 840, 844 (9th Cir.
2 2001).

3 B. The ALJ's Decision -- Application of the Five-Step Process

4 In the first step of the five-step evaluative process, Judge Laverdure found that
5 plaintiff had not performed substantial gainful activity since December 11, 2001, the
6 alleged onset date of her disability. He then found that she had 'severe impairments'
7 that arose from degenerative disk disease of the lumbar spine at L3-4 and L4-5 with
8 left lower extremity radiculopathy and some secondary depression. Upon finding that
9 plaintiff's impairments did not meet or equal any of the "listed impairments", Judge
10 Laverdure proceeded, as required, to determine plaintiff's Residual Functional
11 Capacity (RFC). He found that plaintiff had an "RFC for a range of work at the light
12 exertional level with the need for a sit-stand option 'at will', the ability to lift/carry
13 up to 10 pounds frequently and up to 20 pounds occasionally, the ability to
14 occasionally balance, stoop, kneel, crouch and crawl and preclusion from working on
15 heights (ladders, ropes, or scaffolds)." ALJ Decision, p. 5; Administrative Transcript
16 ("AT"), p. 39. As evidence to support his findings, Judge Laverdure relied on a
17 comprehensive orthopedic evaluation by Dr. Holly Kelly, the RFC assessment of state
18 agency medical advisors, and, to a lesser extent, the provisional opinions of
19 examining orthopedic surgeon Ramsey and neurologic QME Abeliuk. He also relied
20 on plaintiff's own testimony about the extent and nature of her activities of daily
21 living.

22 Judge Laverdure found that plaintiff's testimony was generally credible but that
23 her allegation that she could not perform any work was inconsistent with the medical
24 evidence and opinions supporting an RFC for a range of work at the light exertional
25 level and with her own account of her activities of daily living. Judge Laverdure also
26 found that plaintiff "perceived the issue of disability in the context of the ability to
27 perform her past work as a grocery clerk." ALJ Decision, p. 4; AT, p. 38. He further
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1 noted that plaintiff originally alleged that her low back pain and radiculopathy were
2 not work-related, but later claimed that these symptoms were exacerbated by a
3 December 2001 slip and fall at her job.

4 Proceeding to steps four and five, Judge Laverdure found -- with the aid of
5 testimony from a vocational expert, Mr. Raschke -- that given her RFC, plaintiff was
6 unable to perform her past relevant work as a produce stocker or grocery clerk. Judge
7 Laverdure then asked plaintiff's counsel to stipulate that there would be a significant
8 number of other jobs in the national economy that an individual with the RFC
9 described above could perform. Plaintiff's counsel agreed to so stipulate, and Judge
10 Laverdure thereupon found that defendant Commissioner had met her burden of proof
11 with respect to step five. Based on this finding, Judge Laverdure found that plaintiff
12 was not disabled within the meaning of the Social Security Act.

13 C. Review of the ALJ's Decision

14 The primary issues raised by plaintiff are (1) whether a new report from one of
15 her doctors warrants a remand for further administrative proceedings; (2) whether
16 substantial evidence exists to support the Administrative Law Judge's finding that
17 plaintiff had a Residual Functional Capacity for work at the light exertional level with
18 certain postural and height limitations; and (3) whether the Administrative Law
19 Judge's finding at step five -- that a significant number of other jobs existed in the
20 national economy that she could perform -- was properly reached.

- 21 1. Does the September 27, 2004, Report by Orthopedic Surgeon
22 James Zucherman Warrant A Remand of Plaintiff's Case for
Further Administrative Proceedings?

23 Plaintiff first argues that her case should be remanded to the Commissioner of
24 Social Security for the consideration of new evidence. Plaintiff's new evidence
25 consists of a September 27, 2004, report from orthopedic surgeon James Zucherman.
26 See Attachment to Plaintiff's Motion and Notice of Motion for Summary Judgment
27 And/Or Remand, filed November 21, 2005 ("Plaintiff's Motion").
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1 A. Dr. Zucherman's September 27, 2004 Report

2 Dr. Zucherman's report documents his consultation with plaintiff on September
3 27, 2004. At this consultation, Dr. Zucherman examined plaintiff, reviewed her
4 recent MRI results, and evaluated her answers to a pain questionnaire. Dr.
5 Zucherman's report states that plaintiff's MRI scan, "shows a broad based disc
6 herniation at the L3-4 and L4-5" which is "consistent with the findings on plaintiff's
7 discography back in the latter part of 2002." September 27, 2004, Dr. Zucherman
8 Report, p. 1 ("New Zucherman report"). Dr. Zucherman also noted that plaintiff
9 reported to him that her symptoms had worsened since her last evaluation, and that
10 she had new symptoms in her low back and legs, which "started without apparent
11 cause". New Zucherman Report, p. 2.

12 Dr. Zucherman's report recommends that plaintiff undergo arthroplasty surgery.
13 This recommendation was apparently based primarily on the results of plaintiff's new
14 MRI scan, the failure of more conservative care options to alleviate plaintiff's lower
15 back and leg pain, plaintiff's new and worsening symptoms, and Dr. Zucherman's
16 opinion that disc arthroplasty would be preferable to a fusion procedure.

17 B. Statutory Requirements for Remand

18 Two statutory requirements exist for the remand of an action in light of
19 additional evidence in a disability insurance benefits case: (1) there must be good
20 cause for failing to include that new evidence in prior proceedings, and (2) the
21 evidence must be new and material. 42 U.S.C. § 405(g); Mayes v. Massanari, 276
22 F.3d 453, 461 (9th Cir. 2001).

23 (i) Good Cause Requirement

24 We first address the good cause requirement. Plaintiff's counsel asserts that
25 there is good cause for his failure to include Dr. Zucherman's report in the record
26 before the Appeals Council. Defendant's brief does not seriously contest this
27 assertion.
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1 Dr. Zucherman's report is dated approximately eighteen days before the
2 Appeals Council issued an order and notice ending the administrative proceedings.
3 Plaintiff's counsel contends, however, that the report did not come into his possession
4 until after the Council issued its order. We also note that plaintiff's counsel did send
5 correspondence to the Appeals Council informing them of the report's anticipated
6 existence and implicitly requesting that the Council wait to decide plaintiff's case
7 until it had reviewed the report. See Correspondence dated August 16, 2004; AT, p.
8 18 and Correspondence dated September 23, 2004; AT, p. 15. The Council appears
9 to have either ignored or denied counsel's request.

10 Given that Dr. Zucherman's report apparently was not in plaintiff's counsel's
11 possession at the time that the Appeals Council issued its decision, and that plaintiff's
12 counsel attempted to ensure its inclusion in the administrative record, we find that
13 plaintiff has shown good cause for her failure to include the report in the
14 administrative proceedings.³

15 (ii) Materiality of Dr. Zucherman's Report

16 We must now decide whether Dr. Zucherman's report is "new and material"
17 such that remand is warranted. "To be material under section 405(g), the new
18 evidence must bear 'directly and substantially' on the matter in dispute. [The plaintiff]
19 must additionally demonstrate that there is a 'reasonable possibility' that the new
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22 We note that, after the Appeals Council issued its order, plaintiff's counsel requested additional
23 time in which to file an action in district court. A Social Security Administration Legal Assistant,
24 who appears to have misapprehended plaintiff's counsel's request, responded by sending
25 correspondence indicating that the Appeals Council would wait to issue a decision until the new
26 evidence had been submitted. See Correspondence dated May 19, 2005, from Lona Murphy to
27 William Galvin, AT, pp. 7-8; Correspondence dated July 19, 2005, from Lona Murphy to William
28 Galvin, AT, pp. 5-6. To repeat, however, the Council had already issued its decision.

We find that the correspondence of May 19, 2005, and July 19, 2005, was NOT responsive to
plaintiff's counsel's request and therefore does not alter our finding that plaintiff has shown good
cause for her failure to present Dr. Zucherman's report to the Appeals Council.

1 evidence would have changed the outcome of the administrative hearing." Mayes v.
2 Massanari, 276 F.3d 453, 462 (9th Cir. 2001) (internal citations omitted).

3 Defendant argues that there is not a 'reasonable possibility' that Dr.
4 Zucherman's report would have changed the ALJ's determination. Defendant points
5 out that evidence that surgery had been recommended for plaintiff was already in the
6 administrative record. Defendant also asserts that, "[w]hile Dr. Zucherman's new
7 report may indicate that plaintiff's symptoms have recently worsened, plaintiff has
8 failed to show that the new evidence is material to and probative of her condition **as**
9 **it existed at the relevant time.**" Defendant's Notice, Motion and Memorandum In
10 Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiff's
11 Motion for Summary Judgment, filed December 22, 2005 ("Opposition"), p. 4
12 (emphasis added) (citing 20 C.F.R. § 404.970(b) (**Appeals Council shall consider**
13 **new and material evidence only where it relates to period on or before date of**
14 **Administrative Law Judge's hearing decision**) (emphasis added).)

15 Plaintiff disputes defendant's assertion, claiming that Dr. Zucherman's
16 September 2004 surgery recommendation "does reflect on, affect and effect the
17 retroactive and more informed views of Plaintiff's condition during the period under
18 review." She argues that this more informed view of her past condition "would
19 require a change in considerations and findings about the severity and permanency
20 of her impairment," Plaintiff's Reply to Defendant's Opposition and Opposition to
21 Defendant's Cross-Motion for Summary Judgment, filed January 19, 2006 ("Reply"),
22 p. 3, which could reasonably cause the ALJ to change his assessment of her Residual
23 Functional Capacity -- and thus the outcome of the administrative hearing.

24 We are more persuaded by defendant's characterization of Dr. Zucherman's new
25 report than by plaintiff's. Review of the administrative record reveals that the option
26 of arthroplasty surgery had been discussed with plaintiff for close to two years before
27 Dr. Zucherman issued his report in September of 2004. See, e.g., October 1, 2002,
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1 Correspondence From Dr. Zucherman to Dr. Pickett ("Whether she decides to go
2 ahead with surgery is elective. Since there is no right answer as to what people
3 should do in such situations, I told her personally if I was in her shoes and was unable
4 to do a job, I would go ahead and proceed with surgery . . ."); October 14, 2002,
5 Correspondence from Dr. Zucherman to Rolando Gonzales ("The patient recounted
6 her current situation of being unable to work for a year and she has been feeling
7 worse than usual lately. She still has not formally made a decision as to whether she
8 wishes to pursue surgery; namely, fusion or arthroplasty of L3-4 and L4-5 or consider
9 the IDET procedure.") We also note that Dr. Zucherman's September, 2004, report
10 characterizes plaintiff's then-recent MRI findings as 'consistent' with the findings
11 from plaintiff's 2002 discography. In addition, while this report does seem to
12 recommend arthroplasty surgery more emphatically than past reports, it seems to us
13 that the primary emphasis is on the election of arthroplasty surgery over a fusion
14 procedure, rather than the necessity for surgery in the first instance.

15 Dr. Zucherman's report of September 24, 2004, also notes that plaintiff
16 complained that her symptoms had recently intensified – but for no apparent reason.
17 Any such intensification of plaintiff's pain or worsening of her condition is irrelevant
18 to our disposition of the request for a remand because it is only evidence about
19 plaintiff's condition at the time the ALJ made his decision that is relevant. Changes
20 in medical conditions that occurred thereafter might be sufficient to support a new
21 application by plaintiff for benefits, but could not justify a remand.

22 In sum, because the administrative record before the ALJ clearly reflected that
23 surgery had been recommended to plaintiff, and in light of the consistency of
24 plaintiff's MRI findings with her 2002 discography findings, we cannot find that there
25 is a 'reasonable possibility' that Dr. Zucherman's September, 2004, report
26 recommending that plaintiff undergo surgery would have changed the outcome of
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1 plaintiff's administrative hearing. We therefore must DENY plaintiff's motion to
2 remand her case for consideration of this report.

3 2. Was the Social Security Administration's Determination of
4 Plaintiff's Residual Functional Capacity Unsupported by
Substantial Evidence or Otherwise Improperly Reached?

5 At the heart of plaintiff's case is her assertion that the Social Security
6 Administration improperly overestimated her Residual Functional Capacity. As
7 explained above, Judge Laverdure essentially found that plaintiff could perform a job
8 that requires only light physical exertion - so long as she could sit or stand at will.
9 Plaintiff claims, however, that she cannot perform even 'light' work because the pain
10 associated with her back condition would cause her to need frequent and unscheduled
11 rest breaks, and that those breaks would render her too unproductive to perform any
12 type of job.

13 Plaintiff's primary challenge is to the Residual Functional Capacity finding
14 made by Judge Laverdure, although she also challenges the Appeals Council decision
15 upholding that finding. We first address plaintiff's challenges to Judge Laverdure's
16 Residual Functional Capacity finding.

17 A. Judge Laverdure's Residual Functional Capacity
18 Determination

19 Plaintiff's motion contains many challenges to Judge Laverdure's assessment
20 of her Residual Functional Capacity. For the most part, her challenges focus on the
21 Judge's failure to incorporate her alleged need for frequent unscheduled rest breaks
22 into his Residual Functional Capacity assessment. She alleges that the Judge reached
23 his Residual Functional Capacity finding by improperly ignoring and/or rejecting her
24 testimony regarding the need for rest breaks and by improperly rejecting her treating
25 physician's opinion that she needed such breaks. She also alleges that a Residual
26 Functional Capacity finding that does not include a need for unscheduled rest breaks
27 is not supported by substantial evidence in the record.
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1 In addition to these substantive arguments, plaintiff's motion contains a
2 technical argument that Judge Laverdure's decision does not comply with Social
3 Security Ruling 96-7p. We turn first to plaintiff's substantive arguments.

4 (i) Alleged Need for Unscheduled Rest Breaks

5 Whether or not plaintiff truly has a need for frequent unscheduled rest breaks
6 is a question that is answered inconsistently by the various informational sources
7 compiled in the administrative transcript before this court. Clearly plaintiff and her
8 lawyer believe that she has such a need. Her treating physician, Dr. Pickett, has
9 repeatedly stated that plaintiff needs frequent rest breaks. On the other hand, other
10 medical evaluations included in the transcript, prepared by Dr. Holly Kelly and a
11 state agency physician, and a careful examination of plaintiff's testimony and other
12 documents regarding the extent of her daily activities, strongly suggest otherwise.

13 We first examine plaintiff's testimony at the hearing before Judge Laverdure.
14 The most relevant portions of plaintiff's testimony are transcribed below:

15 Q: Now, in a given day, in an ordinary day, would you run us through
16 a typical day from the time you get up until the time you go to bed? But let's
break it into pieces. What time do you get up?

17 A: I usually get up between -- about 6:30 a.m. Get up and wake my son
18 up. My daughter's already up, she's going off to school. I help my son with
19 his breakfast, make his lunch. He is picked up to go to school. Then I try to
20 do a load of laundry a day so that it doesn't get overwhelming. And then, you
21 know, I kind of, you know, maybe I -- housework-wise, I try to do -- like I'll
22 vacuum one day, I'll sweep one day. So maybe I do a household task and, you
23 know, if I have a couple errands to do. I might visit my mom. I try to take a
24 walk every other day between 30 and 40 minutes. I don't go to the physical
25 therapist anymore, but I still do the exercises at home that they've done, so I
26 try to do that. And you know, I am taking the class, the computer class, so
27 that's two days a week for about an hour and a half maybe I'm there. So I
28 have that. And then, you know, then I have to pick up the kids from -- well,
pick up my daughter and my son from school. Come home, kind of sit around
and talk to them, see what's going on, then get their homework going. If they
need help, I help them with their homework. You know, and then it's
dinnertime. Sometimes the kids help me with dinner, depending on what

1 we're doing. We have dinner and then, you know, I usually sit down and read
2 or watch TV or, you know, we might play a game or something.

Q: During the course of the day, do you need to rest?

3 A: You know, I do, you know, like I say, I watch more TV than I like
4 to, so I do, you know, sit down or --

Q: Do you find it's necessary to sit down or lay down on --

5 A: Yeah. If I can sit down and put my feet up, you know, on the couch,
6 that's like good rest for me. I --

Q: [Inaudible]

7 A: -- doze off for a few minutes.

Q: Do you do that every day?

8 A: I would say yeah.

9 Q: Do you do it in the morning or the afternoon or when?

10 A: More so in the afternoon.

11 Social Security Administration Offices of Hearings and Appeals, Transcript of
12 February 11, 2004 Hearing ("Hearing Transcript"), pp. 13-14; AT, pp. 355-56.

13 Q: If you put in an active day as you described, running errands, driving,
14 maybe even doing housework, do you have to take breaks just when you need to stop
15 or lay down or sit or do anything else to relieve the back?

16 A: Yeah, I'll, you know, I'll do something. And like if I've done
17 errands, then I come home and I'll sit down and relax and read a book or, you
18 know.

Q: And how long would you need to do that? If you had one of those
19 actives [sic] days, would there be a number of times during the day when you
20 would have to stop and -

21 A: Three or four times, you know. If I could take a break, you know,
22 between 15 minutes to a half an hour, you know, if I could sit down with my
23 feet up.

Q: Does the feet up help?

24 A: Yeah.

25 Q: Does you elevating that foot, even when you're seated doing
26 something, help or does it only help if you're trying to relieve pain? Can you
27 work with your foot elevated?

A: I never tried that, never done that.

28 Q: But at some point you need to stop, elevate your foot, elevate your
leg.

A: That's the best way for me to -- yeah. If I'm going to rest I'll sit
down on the couch or sit down on the bed with the pillows behind me with my
feet up. That's the best.

1 Q: And in an active day you may have to do something like that as
2 many as four times during the day?

3 A: Yeah. And then - yeah. And then at the end of the day, like I say,
4 after dinners over, the couch is mine.

5 Q: Okay. And those breaks, those four breaks you take during the day,
6 how long would you need to do that?

7 A: You know, between 15 minutes to half hour, you know, if nothing's
8 goin on, you know, I'll stay there for an hour.

9 Hearing Transcript, pp.25-26; AT, pp. 367-68.

10 Later in the hearing, plaintiff's counsel posed the following hypothetical to
11 vocational expert Robert Raschke:

12 Atty: If even under the sit/stand option at will, would that allow for
13 breaks, unscheduled breaks of up to 15 minutes to a half an hour up to four
14 times a day?

15 VE: Generally not. I mean it would, you know, according to labor
16 regulations everybody gets a 10 to 15 minutes break, morning and afternoon
17 and a half hour to an hour lunch break, depending upon the employer. But if
18 you're talking about unscheduled ones where the person's going to be away
19 from the workplace as long as up to half an hour a couple of times a day, no.

20 Atty: So that would undermine even the light with the sit/stand option?

21 VE: Sure. It wouldn't be --

22 ALJ: I think it would rule out all work on a --

23 VE: Yes, it would.

24 ALJ: -- regular basis probably.

25 VE: It wouldn't be a productive pace.

26 ALJ: Yeah. Under those kinds of circumstances, I don't think there's
27 any issue about that, because --

28 Atty: Right.

ALJ: -- that much absence from the work station basically --

Atty: Yeah.

ALJ: rules out all work.

Hearing Transcript, pp. 36-37; AT, pp. 378-79.

Plaintiff's counsel contends that Judge Laverdure rejected plaintiff's testimony
about the severity of her symptoms – and that any such rejection by an ALJ must be

1 supported by clear and convincing evidence.⁴ Smolen v. Chater, 80 F.3d 1273, 1283-
2 84 (9th Cir. 1996). We conclude, however, that plaintiff's counsel has
3 mischaracterized the central thrust of Judge Laverdure's reasoning.

4 Plaintiff's counsel specifically focuses on the issue of unscheduled rest breaks,
5 arguing that Judge Laverdure's RFC finding improperly ignores plaintiff's testimony
6 that she needed up to four unscheduled rest breaks a day. The problem with this
7 argument is that plaintiff did not testify that she needed four unscheduled rest breaks
8 a day.

9 In fact, the distinction between 'unscheduled' and 'scheduled' rest breaks first
10 surfaced during plaintiff's counsel's hypothetical to the vocational expert. Plaintiff's
11 testimony was that, on an average "active" day, she might rest for fifteen minutes to
12 a half-hour three or four times. Nothing in her testimony suggests that, if at work, she
13 could not rest during scheduled breaks.

14 In other words, we think that there is some space between plaintiff's testimony
15 and her counsel's hypothetical. It is not clear why plaintiff's scheduled rest breaks
16 (i.e. the two fifteen minute breaks and half-hour to hour lunch breaks to which
17 plaintiff is entitled under the pertinent labor regulations) could not accommodate
18 most -- if not all -- of her need for rest breaks, particularly if she was performing
19 'light' work.

20 Accordingly, when we focus on plaintiff's testimony, it is not at all clear that
21 Judge Laverdure "rejected" that testimony. Instead, he appears to have concluded

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24 In her reply, plaintiff argues that where there is no evidence of malingering, an ALJ's findings
25 supporting his rejection of subjective pain testimony must be "clear and convincing". Reply, p. 6.
26 In contrast, the government's opposition suggests that the ALJ must only make 'specific findings' that
are supported by substantial evidence in the record to properly reject a claimant's subjective pain
testimony.

27 Because we believe that Judge Laverdure's findings in support of his rejection of plaintiff's
28 testimony meet the higher 'clear and convincing' standard, we assume, without deciding, that that
standard applies.

1 that, at least when she was not answering transparently leading questions, she was
2 trying to be truthful and was generally describing accurately the extent to which and
3 the circumstances under which her medical condition caused her to experience pain.
4 With substantial evidentiary justification, Judge Laverdure perceived that plaintiff's
5 testimony on these subjects was in some measure inconsistent – but that, considered
6 in its entirety and viewed objectively, that testimony's essential message was that
7 plaintiff could engage in at least light activities for substantial periods of time as long
8 as her routine included rest breaks.

9 Viewing Judge Laverdure's reasoning in this way, we cannot conclude that he
10 "rejected" or refused to credit plaintiff's testimony about her subjective symptoms.
11 Instead, as we have indicated, it appears to us that the judge essentially credited
12 plaintiff's testimony about how she felt – but rejected her conclusion that how she felt
13 made it impossible for her to work at any reasonably accessible job. It follows that
14 Judge Laverdure was not constrained to identify clear and convincing evidence that
15 plaintiff's account of her symptoms was incredible.

16 But even if that standard were applied, Judge Laverdure's decision would
17 withstand plaintiff's attack. Judge Laverdure pointed to several kinds of evidence
18 in the record that contradicted an assertion that the extent of plaintiff's symptoms
19 would prevent her from doing any job for which she was qualified. That evidence
20 included: (1) plaintiff's testimony was inconsistent with the medical evidence
21 (including, most significantly, the report prepared by Dr. Holly Kelly, and the
22 assessment prepared by State Agency medical advisors), (2) plaintiff initially stated
23 that her lower back pain was not aggravated by her December 2001 slip and fall, and
24 (3) plaintiff's testimony is inconsistent with the extent of her daily activities.⁵

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26 ⁵
27 Judge Laverdure also found that plaintiff mis-perceived the issue of disability. Plaintiff argues that
28 Judge Laverdure "apparently gave weight to the finding that plaintiff misperceived the issue of
disability without explaining how that factor would bear on credibility." Plaintiff's Motion, p. 7.

1 We find Judge Laverdure's findings both clear and convincing. The report
2 prepared by Dr. Kelly, who examined plaintiff in October of 2003, found that plaintiff
3 had a number of physical limitations -- but did not find that plaintiff needed frequent
4 rest breaks. Her opinion clearly contemplates plaintiff working at a job.⁶ The state
5 agency physician's separate assessment opines that plaintiff has a Residual Functional
6 Capacity to perform light work. This assessment states that plaintiff can stand and/or
7 walk about six hours in an eight-hour work day, and can sit for about six hours in an
8 eight hour workday with normal breaks. We also find that the discrepancy in
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13 Plaintiff further contends that Judge Laverdure improperly discounted her credibility based on that
14 finding.

15 The pertinent statement from Judge Laverdure's decision reads as follows: "to this extent [i.e., to
16 the extent that plaintiff claims that she cannot perform any work], I find that claimant perceives the
17 issue of disability in the context of the ability to perform her past work as a grocery clerk and
18 produce stocker that she has performed for the last 28 years." ALJ Decision, p.4; AT, p. 38.

19 We do not view the judge's statement as a 'finding'. Rather, we believe it is an explanation -- an
20 explanation of how he could find plaintiff and her testimony 'generally credible' and yet not find that
21 she is disabled. In other words, we believe Judge Laverdure is stating (speaking in his voice)
22 something akin to the following: 'plaintiff genuinely believes that she is disabled, and generally I
23 find that she and her testimony are credible - but I don't think that her belief that she is disabled
24 within the meaning of the Social Security Act is credible because she mistakenly conflates the idea
25 of being disabled with not being able to perform her past job.'

26 In any case, we do not rely upon Judge Laverdure's view that plaintiff 'misperceives the issue of
27 disability' to support our determination that there was substantial evidentiary support for the judge's
28 conclusion that plaintiff's testimony about how her medical condition affected her was not
inconsistent with a finding that she was not disabled from performing any relevant work.

6

24 In her reply, plaintiff argues that Dr. Kelly's 'RFC report' was based only on objective measures
25 and not on plaintiff's 'reported symptomology'. Reply, p. 6, n.4. We note that although the form
26 referenced by plaintiff, AT at 299-302, did not include a category that would naturally encompass
27 a rest-break type limitation, Dr. Kelly also wrote a comprehensive orthopedic evaluation that
28 concludes with a textual functional assessment/medical source statement that describes what plaintiff
could reasonably be expected to do. We see no reason why a rest-break limitation would not have
been included (if warranted by the evaluation) in this section.

1 plaintiff's positions regarding the effect of her fall at work on her back condition
2 somewhat diminished her credibility.⁷

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4 7

5 Plaintiff argues that Judge Laverdure should not have drawn a negative inference about her
6 credibility from the change in her position regarding the effect of her fall at work. She insists that
7 her "consistent account" has been that her existing back pain was aggravated by her fall at work.
8 Plaintiff's Motion, pp. 6-7. In contrast, defendant contends that plaintiff originally alleged that her
9 low back pain and radiculopathy were not work-related, and that it was not until May 14, 2002, that
10 plaintiff alleged that her low back pain was aggravated by her December 2001 slip and fall.

11 The relevant statement from Judge Laverdure's decision, in context, is as follows: "I find that
12 claimant perceives the issue of disability in the context of the ability to perform her past work as a
13 grocery clerk and produce stocker that she has performed for the last 28 years. In that context, I also
14 note Dr. Ramsey's observation that claimant originally alleged that her low back pain and
15 radiculopathy was not work-related. However, on May 14, 2002, claimant alleged that her low back
16 pain was secondary to the December 2001 fall." ALJ Decision, p. 4; AT, p. 38.

17 After carefully reviewing the portions of the record which the parties cite in their papers as
18 supporting their respective positions, we find that both sides are overreaching.

19 Plaintiff first cites an assessment signed on April 8, 2002, by Dr. Ramsey, an orthopedic surgeon.
20 The assessment appears to have been completed in the context of plaintiff's workers compensation
21 claim.

22 In this assessment, Dr. Ramsey describes the "history *as provided by the patient* . . . She describes
23 a fall at work, landing on the left hip or buttock area on December 11, 2001. She indicates that this
24 aggravated pre-existing low back pain and initiated left sciatic complaints." Ramsey Assessment,
25 p. 1; AT, p. 169. The letter goes on to say, "Based on the history she provided and limited medical
26 records, which appear to support this history, I would consider it medically probable that she has
27 aggravated a preexistent back problem and created related sciatic complaints as a result of her
28 industrial fall in December 2001. This is superimposed on the past history of nonradiating low back
29 pain, not known to be work related. **Review of previous medical data would be desirable to
confirm this impression.**" Ramsey Assessment, p. 4; AT, p. 172 (Emphasis added).

30 Dr. Ramsey, however, performed a second assessment of plaintiff in June of 2002. **Defendant**
31 cites this assessment in support of her position. In this assessment, Dr. Ramsey summarizes
32 additional medical records that he has received and reviewed regarding plaintiff. Following this
33 summary, Dr. Ramsey states that, "**The above information contradicts the history previously
received.** Clearly, Dr. Talcott describes her recent fall in December 2001 as causing no change in
34 her pre-existing complaints. Prior to this time, her problem had been indicated as non-industrially
35 related . . . It is somewhat curious that a slip and fall aggravating pain is now claimed, whereas at
36 the time or shortly thereafter, her treating doctor thought it was not particularly aggravating.

37 Such a history is certainly consistent with an aggravating incident, but I would certainly expect
38 some evidence of the aggravation to be recognized shortly after it occurred. Otherwise, I would have
39 to conclude that this incident was not particularly aggravating and that her problem represents a long-
40 standing ongoing problem not known to be related to work." Second Ramsey Assessment, pp. 2-3;
41 AT, pp. 167-68.

1 Finally, we find that plaintiff's description of her daily activities is inconsistent
2 with the notion that she cannot routinely perform a light day's work. Plaintiff's
3 typical day encompasses getting up at 6:30 a.m., preparing breakfast for her son and
4 dinner for her family (with occasional help), doing laundry, performing some
5 housework, taking a thirty-forty minute walk (every other day), performing physical
6 therapy exercises, running errands, picking up both her children from school, and,

7
8 Besides Dr. Ramsey's first assessment, plaintiff cites only an RFC assessment dated in December
9 of 2002 (in connection with plaintiff's application for Social Security benefits). Although the
10 assessment does describe plaintiff's medical history as 'undocumented low back pain aggravated by
11 December 2001 fall' there is nothing in the assessment which undermines the notion that plaintiff
12 and her treating physician initially described the fall as NOT aggravating her back condition. Indeed,
13 later on in the assessment the evaluator notes, "Initially claimant and TP [treating physician]
14 submitted paperwork for nonindustrial injury and disability, then changed their history to suggest
15 industrial cause (Ramsey MD 6/02), which erodes their credibility somewhat." RFC Assessment,
16 p. 6; AT, p. 260.

17 Defendant also cites a "Doctor's First Report of Occupational Injury or Illness" which describes
18 plaintiff's slip and fall as causing/aggravating plaintiff's leg and lower back pain. It is dated May
19 14, 2002. Despite the title of this document (i.e., Doctor's First Report) we located another 'Doctor's
20 First Report of Occupational Injury or Illness' -- this one dated in February of 2002. AT, at 125. The
21 February, 2002, report includes statements from plaintiff describing her left sciatica pain as constant
22 since the December 11, 2001, fall and her lower back pain as worse since the fall.

23 From what we can ascertain from the record, plaintiff first complained that the fall aggravated her
24 back and leg pain in February of 2002 - two months after the fall. Given this significant lapse in
25 time, we do not believe that it was unreasonable for Judge Laverdure to draw a negative inference
26 regarding plaintiff's credibility from the discrepancy between her and her treating physician's initial
27 position regarding the impact of the fall and their later position.

28 On the other hand, Judge Laverdure's statement that "on May 14, 2002, claimant alleged that her
low back pain was secondary to the December 2001 fall" implies that he may have believed that
plaintiff did not change her position until May of 2002. If this was the case, the judge probably drew
a stronger inference than warranted about plaintiff's (lack of) credibility.

In sum, we believe that the change in plaintiff's position about the effect of her fall on her back
condition could lend some modest support to a finding that plaintiff was in some measure
exaggerating the severity of her symptoms. We emphasize, however, that regardless of whether
Judge Laverdure understood the change in plaintiff's position to have first occurred in February or
in May, it is unlikely that he ascribed appreciable significance to that change when he determined
plaintiff's RFC. We also emphasize that there was ample support in the record for the way Judge
Laverdure treated plaintiff's testimony without ascribing any significance to the change in her
position or when that change occurred.

1 sometimes, visiting her mother, taking a computer class, and helping her children
2 with their homework.

3 In sum, we find that Judge Laverdure's assessment of plaintiff's Residual
4 Functional Capacity is largely consistent with her testimony. To the extent it rejects
5 any of plaintiff's testimony, we find that that rejection is supported by clear and
6 convincing reasons.

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9 Plaintiff next argues that Judge Laverdure's finding of plaintiff's Residual
10 Functional Capacity improperly ignored or rejected an opinion expressed in June of
11 2003 by her treating physician, Dr. Pickett. In June, 2003, Dr. Pickett noted on a one-
12 page form titled 'Treating Physician's Report of Disability Status' that plaintiff's job
13 performance limitations included a need for "frequent rest periods." AT, p. 270.⁸ The
14 Disability Status form does not explain the bases for Dr. Pickett's opinion regarding
15 plaintiff's limitations, including the rest break limitation. On the form, Dr. Pickett also
16 opines that plaintiff is currently able to perform light job duties if they are available,
17 provided that the physical limitations described on the form are accommodated.

18 Plaintiff insists that Judge Laverdure's decision improperly discounted the
19 opinion expressed by Dr. Pickett on the June 2003 Disability Status form that her
20 physical limitations included a need for frequent rest breaks. Plaintiff appears to
21 make two arguments with regard to Dr. Pickett's opinion: first, that Judge Laverdure
22 failed to either 'credit or discount' the opinion, and second, if Judge Laverdure's
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26 Dr. Pickett does not state that plaintiff's need to rest frequently could be accommodated only by
27 unscheduled rest breaks. Therefore, as with plaintiff's hearing testimony, we believe that Judge
28 Laverdure's Residual Functional Capacity finding can be interpreted as largely consistent with Dr.
Pickett's opinion. However, we will assume, for the purposes of our analysis, that Dr. Pickett's June
2003 report envisioned at least some unscheduled rest breaks.

1 decision is interpreted as rejecting Dr. Pickett's opinion, that the judge's decision
2 failed to give adequate reasons for the rejection.

3 In response to plaintiff's first argument, defendant contends that Judge
4 Laverdure acknowledged -- and rejected -- Dr. Pickett's opinion that plaintiff needed
5 frequent unscheduled rest breaks. We agree with defendant.

6 First, we note that in the section of his decision entitled "Evaluation of the
7 Evidence", Judge Laverdure expressly acknowledges Dr. Pickett's rest break
8 limitation: "J.C. Pickett, M.D. has treated claimant since January 2002 and completed
9 multiple disability forms indicating temporary disability. Exhibit 11F. However, Dr.
10 Pickett did not specify functional limitations until June 5, 2003, when he stated that
11 claimant could lift up to 10 pounds, carry up to 15 pounds with preclusion from
12 bending, climbing and kneeling **and the need for frequent rest breaks.**" Exhibit
13 11F/5. (Emphasis added).

14 In the section of his decision explaining his RFC determination, Judge
15 Laverdure does not explicitly mention Dr. Pickett's rest break limitation, but he does
16 state that he "gives little weight to Dr. Pickett's various opinions indicating temporary
17 disability as they were provided within the context of workers' compensation and, as
18 such, address issues of causation and the ability to return to **past work**. In addition,
19 until the June 2003 assessment, Dr. Pickett's disability opinions are vocational in
20 nature and do not specify functional capacities." ALJ Decision, p.4 (emphasis
21 added); AT, p. 38. Judge Laverdure also notes that, "Dr. Pickett's June 2003 opined
22 functional limitations are generally consistent with the above RFC." ALJ Decision,
23 p. 4; AT, p. 38.

24 In the Court's view, Judge Laverdure's decision acknowledges Dr. Pickett's
25 opinion that plaintiff's physical limitations included a need for frequent rest breaks,
26 and rejects that opinion to the extent it implies a need for frequent unscheduled rest
27 breaks. See Magallanes v. Bowen, 881 F.2d 747 (9th Cir. 1989) (administrative law
28

1 judge is not required to recite any magic words or incantation to reject a doctor's
2 opinion; reviewing court may draw inferences from administrative law judge's
3 opinion).⁹ Accordingly, we reject plaintiff's argument that the judge's decision fails
4 to sufficiently 'credit or discount' Dr. Pickett's opinion.

5 As mentioned above, plaintiff makes the alternative argument that Judge
6 Laverdure's decision fails to give sufficient reasons for rejecting Dr. Pickett's 'rest
7 break' limitation. Defendant disagrees, contending that Judge Laverdure properly
8 rejected that opinion.

9 As a general rule, more weight should be given to the opinion of a treating
10 source than to the opinion of doctors who do not treat the claimant. Tonapetyan v.
11 Halter, 242 F.3d 1144, 1148 (9th Cir. 2001). Although the treating physician's
12 opinion is given deference, an administrative law judge may reject the opinion of a
13 treating physician in favor of a conflicting opinion of an examining physician if the
14 administrative law judge makes "findings setting forth specific, legitimate reasons for
15 doing so that are based on substantial evidence in the record." Thomas v. Barnhart,
16 278 F.3d 947, 957 (9th Cir. 2002).

17 We find that the combination of Dr. Kelly's opinion, the state agency
18 physician's assessment, the conclusory nature of Dr. Pickett's opinion, the fact that it
19 clearly was directed at a 'prior-job' inquiry, and the extent of plaintiff's daily activities
20 constitute substantial evidence supporting Judge Laverdure's rejection of Dr. Pickett's
21 'rest-break' opinion.

22 Accordingly, we reject plaintiff's arguments to the contrary.

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25 "It is true that the ALJ did not recite the magic words, 'I reject Dr. Fox's opinion about the onset
26 date because . . .' But our cases do not require such an incantation. As a reviewing court, we are not
27 deprived of our faculties for drawing specific and legitimate inferences from the ALJ's opinion. It
28 is proper for us to read the paragraph discussing Dr. Pont's findings and opinion, and draw inferences
relevant to Dr. Fox's findings and opinion, if those inferences are there to be drawn." Magallenes,
881 F.2d at 755.

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3 Finally, plaintiff argues that Judge Laverdure's residual functional capacity
4 finding was not supported by substantial evidence. We disagree. We find that, when
5 considered together, the evidence discussed above, including Dr. Kelly's evaluation,
6 the assessment of the state agency medical advisors, the extent of plaintiff's daily
7 activities, and a careful review of plaintiff's hearing testimony, do constitute
8 substantial evidence supporting Judge Laverdure's residual functional capacity
9 assessment.¹⁰

10 (ii) Compliance with Social Security Ruling 96-7p

11 In addition to making the substantive arguments addressed above, plaintiff also
12 argues that Judge Laverdure "avoided" the process set out in Social Security Ruling
13 ("SSR") 96-7p by omitting the first step of the analysis and by failing to address
14 factors other than plaintiff's activities in the second step. Defendant's brief does not
15 respond to this argument.

16 SSR 96-7p clarifies whether an ALJ's evaluation of a claimant's symptoms,
17 including pain, requires a finding about the credibility of the individual's statements

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¹⁰

19 Plaintiff also alleges that Judge Laverdure's residual functional capacity finding was improperly
20 reached in that the judge did not acknowledge and apparently did not consider her work and
21 earnings history. We disagree. Judge Laverdure did acknowledge plaintiff's work and earnings
22 history. On page three of his decision, Judge Laverdure describes plaintiff as "a 47-year old
23 individual with a high school education and past relevant work as a produce stocker and grocery
24 clerk during the last 15 years," and on page four, he refers to plaintiff's "past work as a grocery clerk
25 and produce stocker that she has performed for the last 28 years." ALJ Decision, pp. 3, 4; AT, pp.
26 37-38. ("By published regulations, the Commissioner has defined 'past relevant work' as a work
27 experience which was done within the last 15 years, lasted long enough for an individual to learn
28 to do it, and constituted substantial gainful activity." Harvey L. McCormick, *Social Security Claims
and Procedures* (5th ed. 1999, Supp. 2005), § 2:53.)

Judge Laverdure clearly acknowledged that plaintiff had worked consistently over a very
substantial period of time. We see no reason to believe that he did not consider this fact when
assessing her credibility.

1 about pain or other symptom(s) and its functional effects; explains the factors to be
2 considered in assessing the credibility of the individual's statements about symptoms,
3 and stresses the importance of explaining the reasons for the finding about the
4 credibility of the individual's statements in the disability determination. SSR 96-7p,
5 1996 WL 374186 (S.S.A.), p.1.

6 The determination under SSR 96-7p involves a two-step analysis. See SSR 96-
7 7p. In the first step, known in the Ninth Circuit as the Cotton test, the administrative
8 law judge determines whether the claimant has produced objective medical evidence
9 of an impairment and has shown that the impairment could reasonably be expected
10 to produce some degree of the alleged symptoms (i.e. pain). See Smolen v. Chater,
11 80 F.3d 1273, 1281-82 (9th Cir. 1996) (citing Cotton v. Bowen, 799 F.2d 1403 (9th
12 Cir. 1986). If the administrative law judge determines that there is insufficient
13 medical evidence of an impairment, or that the impairment could not reasonably be
14 expected to produce some degree of the alleged pain or other symptoms, then the
15 symptom or combination of symptoms cannot be the basis for a finding of disability.
16 If the claimant does not satisfy the first step, the administrative law judge is not
17 required to proceed to step two of the analysis -- in other words, it is unnecessary for
18 him to make a finding regarding the credibility of the claimant's statements.

19 If the first step is satisfied, and there is no evidence of malingering, the
20 administrative law judge must make a finding about the credibility of the individual's
21 statements about the symptom(s) and its functional effects. He may reject the
22 claimant's testimony regarding the severity of symptoms only if he makes specific
23 findings justifying his decision.¹¹

24 An administrative law judge is not required to believe every allegation of
25 disabling pain. Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989). In the second step

26 ¹¹

27 As stated above, we assume, without deciding, that these findings must be clear and convincing.
28 See Note 4.

1 of the analysis, the administrative law judge *may* consider factors such as
 2 inconsistencies in the claimant's testimony, the extent of the claimant's daily
 3 activities, any inadequately explained failure to seek treatment or to follow a
 4 prescribed course of treatment, or other methods of credibility determination.
 5 Bunnell v. Sullivan, 947 F.2d 341, 346 (9th Cir. 1991).¹² In addition, the
 6 administrative law judge *must* consider the factors set out in SSR 96-7p when
 7 evaluating the credibility of symptom testimony. See id. These factors include: (i) the
 8 individual's daily activities; (ii) the location, duration, frequency, and intensity of the
 9 individual's pain and other symptoms; (iii) factors that precipitate and aggravate the
 10 symptoms; (iv) the type, dosage, effectiveness, and side effects of any medication the
 11 individual takes or has taken to alleviate pain or other symptoms; (v) treatment, other
 12 than medication, the individual receives or has received for relief of pain or other
 13 symptoms; (vi) any measures other than treatment the individual uses or has used to
 14 relieve pain or other symptoms; and (vii) any other factors concerning the individual's
 15 functional limitations and restrictions due to pain or other symptoms. SSR 96-7p, p.3,
 16 citing 20 C.F.R. §§ 404.1529(c) and 416.929(c).

17 Plaintiff's argument breaks down into two sub-parts. First, plaintiff argues that
 18 Judge Laverdure improperly omitted the first step of the SSR 96-7p analysis. Second,
 19 plaintiff argues that the judge's step-two analysis improperly failed to address the SSR
 20 96-7p factors other than plaintiff's activities.

21 (a) Judge Laverdure's Alleged Omission of the
 22 First Step of the SSR 96-7p analysis

23 As described above, in the first step of the SSR 96-7p analysis, the
 24 administrative law judge is required to determine whether the claimant has produced

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27 Bunnell refers to SSR 88-13 rather than SSR 96-7p. SSR 88-13 has since been superseded, first
 28 by SSR 95-5p and then by SSR 96-7p. See Brider v. Apfel, 18 F.Supp.2d 900, 906 (N.D. Ill. 1998);
Calehuff v. Halter, 11 Fed. Appx.811 (9th Cir. 2001) (unpublished).

1 objective medical evidence of an impairment that could reasonably be expected to
2 produce some degree of the alleged symptoms (the Cotton test). Plaintiff argues that
3 Judge Laverdure improperly failed to perform this step of the analysis.

4 Although Judge Laverdure did not explicitly find that plaintiff "produced
5 objective medical evidence of an impairment that could reasonably be expected to
6 produce some degree of the alleged symptoms," it is clear that he implicitly made
7 such a finding. As explained above, SSR 96-7p did not require the judge to assess
8 the credibility of plaintiff's testimony unless he found that the first step of the Cotton
9 test had been satisfied. But Judge Laverdure did, in fact, make such an assessment:
10 "Claimant's testimony is generally credible but her allegations regarding inability to
11 perform any work are inconsistent with the medical evidence and opinions supporting
12 an RFC for a range of work at the light exertional level and her activities of daily
13 living. In so finding, I note that . . ." ALJ Decision, p. 4; AT, p. 38 (emphasis
14 added); "Findings (6.) Claimant's subjective complaints, as discussed above, are
15 generally credible, but not to the extent that they would conclusively establish a
16 complete inability to perform any work." ALJ Decision, p. 5; AT, p. 39. In addition,
17 we observe that, at step two of the five-step evaluative disability analysis, Judge
18 Laverdure found that plaintiff had a severe medical impairment.¹³

19 We interpret Judge Laverdure's decision as finding that plaintiff satisfied the
20 Cotton test and reject plaintiff's arguments to the contrary.
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25 Plaintiff has not directed the Court to any legal authority requiring an administrative law judge to
26 make an explicit finding on the first step of the SSR 96-7p process. Moreover, our research has
27 revealed two cases in which district courts have found an implicit finding sufficient. See Powell
28 v. Massanari, 2001 WL 1563712, *3 (N.D. Ca. 2001); Bridger v. Apfel, 18 F.Supp.2d 900, 907, n.6
(N.D. Ill. 1998).

(b) Judge Laverdure's Alleged Failure to Consider
the Second Step Factors Other than Plaintiff's
Activities

As explained above, there are seven factors that an administrative law judge must consider in the second-step of the SSR 96-7p analysis. Plaintiff argues that Judge Laverdure improperly failed to address six of the seven factors (the exception being plaintiff's daily activities).

Although it is clear that an administrative law judge must consider all SSR 96-7p factors, plaintiff cites no authority for the proposition that he must document this consideration by separately analyzing, in writing, each of the factors. We have found one case that directly addresses this issue, Powell v. Massanari, 2001 WL 1563712 (N.D. Ca. 2001) (Chesney, J.). In Powell, Judge Chesney specifically found that although the administrative law judge is required to consider the various factors, he is not required to separately discuss them.

We have reviewed numerous additional opinions addressing the SSR 96-7p process issued by the Ninth Circuit and by district courts falling within the Ninth Circuit's jurisdiction. The cases all state that the administrative law judge must consider the SSR 96-7p factors, but do not state that he must separately address them. See, e.g., Smolen v. Chater, 80 F.3d 1273 (9th Cir. 1996); Vick v. Commissioner, 57 F.Supp.2d 1077 (D.Or. 1999); Hixson v. Apfel, 2000 WL 1897293 (N.D. Ca. 2000).

In sum, plaintiff has not cited, nor could we find, any authority within the Ninth Circuit stating that the administrative law judge must separately analyze all seven factors. In these circumstances, we must decline to fault him for not doing so.

Moreover, it is apparent that Judge Laverdure did consider the SSR 96-7p factors. Indeed, the section of his decision titled, "Evaluation of the Evidence" includes a description of the location (low back and left leg) and duration/frequency (chronic) of plaintiff's pain, the activities that plaintiff described as aggravating that pain (i.e. too much standing, sitting, walking, etc.), the type of medication she was on

1 (Darcovet) and the fact that she suffered no side effects from that medication, other
2 measures she had taken to alleviate the pain (heating pads) and other treatment both
3 had (physical therapy, epidural injections) and considered (surgery).

4 Accordingly, we conclude that Judge Laverdure did not improperly 'avoid' the
5 process set forth in SSR 96-7p.

6
7 B. Appeals Council Decision

8 As mentioned above, in addition to challenging Judge Laverdure's Residual
9 Functional Capacity finding, plaintiff also challenges the Appeals Council decision
10 upholding that finding. More specifically, plaintiff argues that the Appeal Council
11 improperly failed to consider an August 2004 work release prepared by Dr. Pickett,
12 plaintiff's treating physician.

13 The August 2004 work release is essentially a form report listing the medical
14 conditions under which Dr. Pickett believed it appropriate to release plaintiff to work.
15 These conditions include a need for "frequent rest periods" and a restriction that
16 plaintiff work no more than twenty hours per week.

17 Plaintiff's argument regarding the August 2004 work release consists of three
18 sub-parts: (i) the Appeals Council did not consider or acknowledge receipt of this
19 'report'; (ii) the Appeals Council did not provide an adequate explanation for rejecting
20 the report; and (iii) in light of the report, the Appeals Council improperly found that
21 Judge Laverdure's residual functional capacity finding was supported by substantial
22 evidence.

23 Plaintiff's first argument, that the Appeals Council did not consider the work
24 release, is not well-founded. The Appeals Council's decision denying review contains
25 a list of evidence that it considered -- and that list contains Dr. Pickett's August 2004
26 work release. AT, at 11-12, 14. Therefore, it is clear that the Appeals Council
27 considered the work release.
28

1 Plaintiff next argues that the Appeals Council did not sufficiently set forth its
2 reasons for rejecting the opinion expressed in the work release. Defendant contends
3 that "the Appeals Council is not required to state its rationale for denying a request
4 for review of the ALJ's decision." Opposition, p.7. Defendant cites 20 C.F.R.
5 section 404.970(b) in support of this proposition:

6 20 C.F.R. § 404.970(b) reads:

7 If new and material evidence is submitted, the Appeals Council
8 shall consider the additional evidence **only where it relates to the**
9 **period on or before the date of the administrative law judge hearing**
10 **decision.** The Appeals Council shall evaluate the entire record
11 including the new and material evidence submitted if it relates to the
12 period on or before the date of the administrative law judge hearing
13 decision. It will then review the case if it finds that the administrative
14 law judge's action, findings, or conclusion is contrary to the weight of
15 the evidence currently of record.

16 20 C.F.R. § 404.970(b) (emphasis added).

17 After carefully reviewing Regulation 404.970(b) and other pertinent legal
18 authorities on this topic, we conclude that there are certain circumstances in which
19 the Appeals Council must state its rationale when it denies a request for review. The
20 pertinent authorities are not entirely consistent -- but we believe that the relevant
21 standard is most accurately stated as follows: when the Appeals Council receives and
22 considers new evidence from a treating physician, the Council must set forth 'specific,
23 legitimate reasons' for rejecting that opinion if (and only if) the following conditions
24 are met: (i) the evidence pertains to the period on or before the date of the
25 administrative law judge's decision; (ii) the evidence is new and material; and (iii) the
26 administrative law judge's decision is contrary to the record when all evidence,
27 including the new and material evidence, is considered. See generally Ramirez v.
28 Shalala, 8 F.3d 1449 (9th Cir. 1993); 20 C.F.R. § 404.970(b).

1 Dr. Pickett's August 2004 work release does not appear to satisfy the above
2 conditions. First, the report appears to pertain to a period after the date of Judge
3 Laverdure's decision. Second, the 'frequent rest break' limitation specified in the
4 work release is not a new opinion -- as discussed above, Dr. Pickett already expressed
5 that opinion in June of 2003. Finally, we find that the evidence relied upon by Judge
6 Laverdure in making his residual functional capacity assessment still constitutes
7 substantial evidence in support of his decision, even when considered in conjunction
8 with Dr. Pickett's August 2004 work release.

9 Because we find that the conditions that trigger the requirement that the
10 Appeals Council set forth 'specific, legitimate reasons' for rejecting Dr. Pickett's
11 August 2004 work release 'opinion' are not met, we find that the Appeals Council was
12 not required to set forth in detail its reasons for rejecting that opinion.

13 Plaintiff's final argument on this issue is that, in light of the restrictions
14 contained in Dr. Pickett's August 2004 work release, the Appeals Council should not
15 have found that Judge Laverdure's residual functional capacity finding was supported
16 by substantial evidence. As stated above, we disagree with this assertion. We find
17 that Judge Laverdure's residual functional capacity finding was supported by
18 substantial evidence, even when considered in conjunction with the August 2004
19 work release.

20 Accordingly, we deny plaintiff's challenge to the Appeals Council's decision.
21

22 3. Propriety of ALJ's Step Five Finding That a Significant Number
23 of Jobs Exist in the National Economy that Plaintiff Can Perform

24 In the fourth step of the five-step sequential process, Judge Laverdure found
25 that plaintiff was unable to perform her past relevant work as a produce stocker or
26 grocery clerk. In the fifth step of the analysis, however, the Judge found that there
27 were a significant number of other jobs in the national economy that plaintiff could
28 perform. Plaintiff's counsel now disputes the propriety of the ALJ's step-five finding.

1 In step five of the disability analysis, the burden of proof shifts to the
2 Commissioner to demonstrate that the claimant retains residual functional capacity
3 to perform a significant number of other jobs in the national economy that are
4 consistent with the claimant's impairments and vocational factors such as age,
5 education and work experience. The Secretary has developed a series of tables
6 known as "grids" for use in determining disability. The grids take into account
7 various vocational factors, such as age, education and work experience, and the
8 claimant's residual functional capacity. See Razey v. Heckler, 785 F.2d 1426,
9 amended, 794 F.2d 1348 (9th Cir. 1986).

10 Plaintiff's counsel argues that the ALJ improperly reached his step five finding
11 that plaintiff could perform a significant number of jobs in the national economy
12 because the ALJ relied on the medical-vocational guidelines (the grids) and not on
13 testimony from a vocational expert. For reasons we explain below, we disagree.

14 At plaintiff's hearing, when Judge Laverdure reached the fifth step of the
15 sequential process, the Judge asked plaintiff's counsel whether he would **stipulate**
16 that a person with the residual functional capacity that he (Judge Laverdure)
17 ultimately found plaintiff to possess could perform a significant number of jobs in the
18 national economy. As Judge Laverdure explained, plaintiff's counsel's stipulation
19 would obviate the need for expert vocational testimony on this issue. February 11,
20 2004, Administrative Hearing Transcript, pp. 29-30; AT, pp. 371-72. Plaintiff's
21 counsel agreed to so stipulate. Hearing Transcript, p. 31; AT, p. 373.

22 As we have upheld Judge Laverdure's assessment of plaintiff's residual
23 functional capacity under the pertinent legal standards, and because plaintiff's counsel
24 **stipulated** that a person with that residual functional capacity could perform a
25 significant number of jobs in the national economy -- and did not insist on expert
26 vocational testimony on this issue -- we must decline to find that the Commissioner
27
28

1 failed to meet her burden of proof as to step five or that Judge Laverdure's finding as
2 to this step was otherwise improperly reached.

3 Plaintiff's counsel also argues that although he stipulated that a person with the
4 residual functional capacity described by the ALJ could perform a significant number
5 of jobs in the national economy, he did not stipulate that plaintiff could perform such
6 jobs. Rather, plaintiff's counsel posed a hypothetical to the expert, describing an
7 individual with the same residual functional capacity described in the ALJ's
8 hypothetical who also needed to take up to four unscheduled rest breaks a day. The
9 vocational expert testified that the hypothetical person described by plaintiff's counsel
10 would not be sufficiently productive to successfully perform any job. Hearing
11 Transcript, pp. 36-37; AT, pp. 378-79.

12 Plaintiff's counsel argues that plaintiff's residual functional capacity is actually
13 that of the individual described in his hypothetical. He points out that neither the
14 expert's vocational testimony nor a stipulation supports a step-five finding that a
15 person with this residual functional capacity could perform a significant number of
16 jobs in the national economy.

17 We have, however, upheld Judge Laverdure's assessment of plaintiff's residual
18 functional capacity -- and that assessment does not include the unscheduled rest-break
19 limitation of the individual described in counsel's hypothetical. Therefore, the
20 Judge's step-five finding does not need to be supported by evidence that the
21 hypothetical person described by plaintiff's counsel could perform a significant
22 number of jobs in the national economy.

23 Accordingly, we reject plaintiff's contention that the ALJ's step-five finding
24 was improperly reached.

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1 **V. Conclusion**

2 For the reasons set forth above, the Court hereby DENIES plaintiff's motion
3 for remand, DENIES plaintiff's motion for summary judgment, and GRANTS
4 defendant's cross-motion for summary judgment.

5 IT IS SO ORDERED.

6
7 Dated: March 13, 2006

8 
9 WAYNE D. BRAZIL
United States Magistrate Judge

10 Copies to:

11 All parties,
12 WDB, Stats
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